

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**In re: SUBPOENA FOR INSPECTION
AND SAMPLING OF PREMISES
OWNED BY NON-PARTIES IN THE
MATTER OF:**

**STATE OF OKLAHOMA, et al.
Plaintiffs**

vs.

**TYSON FOODS, INC., et al.,
Defendants.**

Case No. 4:05-CV-00329-TCK-SAJ

**POULTRY GROWERS' RESPONSE TO PLAINTIFF'S MOTION FOR
CLARIFICATION OF PORTION OF COURT'S MAY 31, 2006 ORDER**

I. INTRODUCTION

Yesterday, Plaintiff filed its *Motion for Clarification of Portion of Court's May 31, 2006 Order and Request for Phone Conference Hearing* (Dkt. No. 785). As this Court is aware, certain non-parties, referring to themselves as Poultry Growers¹ sought this Court's protection from subpoenas served upon them by the Plaintiff in the present action. This Court, in its May 31, 2006 Order (Dkt No. 757), denied the Poultry Growers' Motion to Quash (Dkt Nos. 493 and 539). Without waiving any right they may have to appeal the Court's decision, the Poultry Growers respond to Plaintiff's motion and ask the Court for clarification of the May 31, 2006 Order and ask the Court for relief from the burdensome interpretation Plaintiff seeks to utilize.

¹ These non-parties are: Bill R. Anderson; Steve Butler, allegedly d/b/a Green Country Farms; Ren Butler and Georgia Butler; Julie Anderson Chancellor; Roger D. Collins; Franklin A. Glenn and Kenneth D. Glenn and Sondra D. Glenn; Juana Loftin; Larry McGarrah and Priscilla McGarrah; Jim L. Pigeon and Michele R. Pigeon; Joel J. Reed and Rhonda Reed and Caleb Reed and Cory Reed; W. A. Saunders and Bev Saunders; Robert V. Schwabe, II; and David R. Wofford and Robin L. Wofford.

II. STATUS OF EFFORTS TO RESOLVE DISCOVERY DISPUTES

On June 5, 2006, the State and the Poultry Growers met and conferred to attempt to resolve discovery disputes that have arisen by reason of differing interpretations of this Court's May 31, 2006 Order (Dkt No. 757). The State and the Poultry Growers were unable to resolve the discovery disputes.

III. NATURE OF DISCOVERY DISPUTE

The Court will recall that the State in its prior papers has dismissively suggested "Each subpoena is clearly not burdensome as it simply requires that the land owner allow access to the property for collection of the samples." Simply put, the State seems to believe that it has now received from the Court permission to come and go at will on the subpoenaed person's property.

One of the specific disputes for which Plaintiff and the Poultry Growers request clarification is with regard to the first paragraph on Page 6 of the Order (Dkt No. 757), which states:

"Plaintiff may enter each premise one time for soil, poultry litter, and groundwater sampling. Plaintiff shall provide at least 72 hours notice to the Poultry Growers and Defendants prior to Plaintiff's entry for sampling."

At the meeting to confer about discovery, the State informed the Poultry Growers that the State has not selected the locations for its soil sampling and geoprobe sampling on each subpoenaed party's property. As a result, the State now seeks to enter each subpoenaed party's property to first conduct a survey before selecting actual sampling locations. Because the State has not yet selected actual sampling locations and because the State apparently only wants to work during daylight hours, the State informed the Poultry Growers that the State will require entry on more than one day to complete the authorized sampling.

The Poultry Growers informed the State that the subpoenaed parties view the Court's Order as placing no limitation upon the number of persons that the State may bring to each sampling location. Further, the Poultry Growers do not interpret the Court's Order to impose a limitation upon the State that all discovery be conducted during daylight hours. From the Poultry Growers' perspective, once the State is sponsored by the subpoenaed party through security at the sampling location, continued work at night does not represent an additional burden on the subpoenaed party. As a result, the Poultry Growers suggested that the State bring such personnel as were necessary to complete the authorized discovery during the one time entry. Finally, the Poultry Growers confirmed for the State that the least burden and least impact upon each subpoenaed party's lives and property will result from compliance with the Court's "one time entry" directive. To conclude their responses to this discovery dispute, the Poultry Growers did not inform the State that the State would be denied access if work was not completed upon a "one time entry." At the conference on discovery, the Poultry Growers merely indicated that the clear language of the Order only allows a "one time entry" and that any variance from that should be addressed to the Court.

On a related topic, at the discovery conference with the State, the State informed the Poultry Growers that the State does not agree to allow the subpoenaed farmer to collect litter samples under the supervision of the State. Based upon the withdrawal of the State from the agreed approach to collecting litter samples, i.e. by the subpoenaed farmer under the supervision of the State, the Poultry Growers informed the State that one exception to the "one time entry" interpretation of the Court's Order will be based upon the Poultry Growers' request that the State not collect litter samples while birds are in the poultry houses. To the extent that the subpoenaed farmer asks that the State delay taking of litter samples until birds are not present in the poultry

house, the subpoenaed farmer understands and agrees that the return entry by the State to collect litter samples will not be a violation of the Court's Order requiring the State to perform all sampling, except for rainfall runoff, during the State's one time entry.

Another dispute which the State raises is one that the Poultry Growers believe the State has created without basis. The Order provides on Page 6 that:

"Plaintiff is permitted to enter each premise on four occasions to sample edge of field rainfall runoff. Plaintiff shall provide at least three hours notice to the Poultry Growers and Defendants with respect to rainwater sampling. ... After giving such notice Plaintiff may proceed with sampling when the requisite time frame for the notice has elapsed."

The State informed the Poultry Growers that it intends to conduct rainfall runoff sampling whenever such occurs, day or night, and whether or not the State actually contacts a subpoenaed party to provide the requisite notice. The Poultry Growers interpret the Court's Order to require actual notice and not merely a representation that the State tried all telephone numbers and reached no one.

To facilitate the State's actual notice, the Poultry Growers have agreed to provide the State with a primary and secondary telephone contact number for each subpoenaed party. In addition, the Poultry Growers have notified the State that the properties of the subpoenaed parties are secure, by which it is communicated that there are locked gates and fences surrounding these properties, and that it will be necessary for the State to be sponsored through security on each property. The Poultry Growers ask that the State confirm that there will be no breach of the peace, i.e. cutting of locks or of fences. The State responds that it is unwilling to delay rainfall sampling if the State is unable to contact a subpoenaed party prior to entry,

suggesting that the subpoenaed party has only to ignore its telephones in order to frustrate the State's access. The Poultry Growers suggest to the Court that it is premature to accuse the subpoenaed parties of bad acts when there has not even been a suggestion of non-compliance with the Court's Order. The subpoenaed parties do not want the State to have unsupervised access to their properties and will make every reasonable effort to comply with the Court's Order. This issue is in dispute simply because the State chooses to attribute future bad conduct to the subpoenaed parties. The Poultry Growers respectfully suggest that this is an issue that the Court needs to address only if the State experiences demonstrable efforts by the subpoenaed parties to frustrate the State's rainfall runoff sampling efforts.

IV. CONCLUSION

WHEREFORE, these Poultry Growers request that the Court provide clarification of the Court's May 31, 2006 Order. Specifically, the Poultry Growers respectfully ask that the Court confirm that the Court intended that the State should accomplish all litter, soil, and geoprobe sampling during a one time entry, even if such entry requires work past sunset. Further, the Poultry Growers respectfully ask that the Court confirm that Plaintiff is required to provide actual notice to subpoenaed parties prior to entry for rainfall runoff sampling events. The Poultry Growers affirm that they have every intention of complying with the Court's Order. The Poultry Growers simply ask that the Court continue in the Court's thoughtful efforts to minimize the impact of Plaintiff's extraordinary discovery expeditions upon non-parties' properties.

Respectfully submitted,

s/ D. Kenyon Williams, Jr.

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ATTORNEYS FOR POULTRY GROWERS

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2006, a copy of the above and foregoing was sent via facsimile to the following counsel of record:

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and that an electronic version of the same was sent this date to the following:

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